UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 803

Case No. 897: ASAMOAH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 22 November 1995, George Asamoah, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(a) To rule that the Applicant's entitlement to non-local benefits has to be derived from his place of residence at the time of recruitment and not by the post for which he was first recruited.

...

(c) To rule further that staff rule 105.3(d) is applicable to the determination of the country of home leave of the Applicant.

(d) To decide further that, in application of staff rule 105.3(d), Ghana is the country of home leave of the Applicant.

(e) To rule that the Applicant be reinstated fully in his rights as a non-locally recruited staff member with retroactive effect of 1 April 1994.

(f) To order that, as compensation for both the injury sustained by the Applicant, and the financial

losses incurred owing to withheld international benefits, a sum of US$20,000.00 (twenty thousand US dollars) be paid to the Applicant."

Whereas the Respondent filed his answer on 1 July 1996;

Whereas the Applicant filed written observations on 26 July 1996;

Whereas, on 4 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 12 and 14 November 1996;

Whereas, on 15 November 1996, the Applicant filed comments to the statements provided by the Respondent on 12 November 1996;

Whereas the facts in the case are as follows:

The Applicant, a national of Ghana, entered the service of the United Nations Office at Geneva (UNOG) on 4 August 1980, as a Finance Clerk in the Division of Administration, Payroll Unit, on a one-year, fixed-term appointment at the G-3, step II level. Neither his initial Letter of Appointment nor his initial Personnel Action Form make any mention of his status as a local or non-local recruit. His Personnel Action Form states that his country of nationality is Ghana and that he was recruited from Annecy, France. A Personnel Action Form dated 18 January 1994, states that, as of 1 January 1994, the Applicant's status would be corrected from non-local to local. The Applicant's appointment was subsequently extended through 31 December 1996.

During his service with UNOG, the Applicant received successive promotions to the G-4 and to the G-5, step XI level, with effect from 1 April 1982 and 1 January 1993, respectively. On 1 October 1993, the Applicant became Accounting Clerk (Audit & Termination). From 5 June 1993, he was temporarily assigned for a period of six months to Haiti with MICIVIH.

On 7 December 1983, the Chief, Personnel Administration Section, informed the Applicant that UNOG would proceed to correct

the Applicant's status from non-local to local recruit, on the ground that a mistake had been made by the UNOG Recruitment Section at the time of the Applicant's appointment. This letter also pointed out that the offer of appointment dated 30 July 1980, which the Applicant had accepted on 4 August 1980, did not mention that his appointment would be on a non-local basis.

On 29 March 1984, the Applicant requested administrative review of this decision.

In a memorandum dated 25 May 1984, the Chief, Personnel Service, informed the Chief, Administrative Review Unit, Office of Personnel Service, at Headquarters, that the Applicant's case had been reviewed and that the decision to change his recruitment status would be upheld. The Chief, Personnel Service, explained that, initially, the Applicant had been correctly reported as recruited on a local basis, but that later, his status had been incorrectly modified by a recruitment officer who added "on a non-local basis" in an internal document.

However, no action was taken during the subsequent ten years to correct the Applicant's status.

In a memorandum dated 14 January 1994, the Chief of the Personnel Administration Section at UNOG informed the Applicant that the Administration would proceed to correct, with effect from 1 January 1994, the Applicant's status from non-local to local recruit, for the reasons set out in the memorandum of 7 December 1983.

On 19 April 1994, the Applicant requested a review of this decision. On 26 July 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 27 July 1995. Its considerations, conclusion and recommendations read, in part, as follows:

"26. ... the Panel concluded that the initial grant of the non-local status to the Appellant was the result of an administrative error. After careful review of similar cases (General Services staff recruited at the same time, beyond the radius of 25 kilometers and of another nationality than the Swiss nationality who were granted local status because of the position they were to fulfil), the Panel found that, considering the category of post incumbered by the Appellant, the absence of any reference to the local/non local status of the Appellant on his letter of offer was to be interpreted as including him in the broad category of General Services staff who are normally recruited on a local basis in accordance with Staff Rules, Appendix B.

27. However, considering the number of years elapsed since the mistake was made and since it was first discovered by the Administration, the Panel was of the opinion that it would be extremely harsh to recover undue international benefits from the Appellant. In that regard, the Panel fully agreed with the statement made on 10 March 1994 by the Chief, Rules and Personnel Manual Section, in reply to the query made by the Chief, Personnel Service on 14 February 1994, who rightly underlined that 'by its own failure to take action, therefore, and by continuing to authorize, year after year, such benefits as home leave and education grant, in [her] view the Organization is estopped from recovering back to 1984 (...) given the multiplicity of the administrative errors in this case and the numerous occasions since 1984 when the Administration should have detected the absence of conformity of the payments with the Staff Rules, and given the fact that the staff member is a G-3, a waiver of even the two years' recovery may be justified'.

28. The Panel was also of the opinion that such a case could be avoided, had the Administration developed a stricter policy of checking the personal files anytime an administrative action has to be taken. The Panel suggested that clear and complete guidelines be set up, especially with respect to categories of posts to which non-local status may be granted, in order to avoid the recurrence of similar cases.

Conclusion and Recommendations

29. The Panel concludes that the Administration has acted in accordance with the relevant rules and procedures of the Organization in correcting the Appellant's status from non-local to local.

30. Nevertheless, the Panel strongly recommends that the Organization refrains from recovering unduly received international benefits for the reasons stated here above. The Panel further recommends that the Organization establish comprehensive and strict guidelines with regard to recruitment procedures.

31. In view of the above, the Panel makes no recommendation in support of the appeal."

On 20 September 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Panel's report which concludes that the correction of an error did not violate your rights as a staff member and has recommended that there be no recovery of benefits obtained by you as a result of the initial administrative error.

The Secretary-General agrees with the Panel's recommendations and has decided that no recovery of benefits obtained by you as an internationally recruited staff member shall take place. The Secretary-General has also decided that the effective date of change of your status shall be 1 April 1994, instead of 1 January 1994."

On 22 November 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The criterion for determination of entitlement to non-local recruitment status is the place of the Applicant's residence at the time of his recruitment, rather than the nature of the post for which he was recruited.

2. The granting of international benefits to the Applicant at the time of his recruitment was in accordance with the relevant Staff Rules and Regulations.

Whereas the Respondent's principal contentions are:

1. Staff members of the General Service category are normally locally recruited. Appendix B to the Staff Rules permits non-local recruitment only in defined circumstances. The Applicant's recruitment did not meet those criteria.

2. Retroactive correction of an error does not violate the Applicant's rights.

The Tribunal, having deliberated from 5 to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent, dated 20 September 1995, accepting a unanimous Joint Appeals Board (JAB) recommendation, dated 27 July 1995, that the Administration had acted in conformity with the relevant rules and procedures of the Organization in correcting the Applicant's status from non-local to local.

II. Appendix B of the Staff Rules defines a locally-recruited staff member as one in the General Services category who, at the time of his appointment, was either a Swiss national or resident within a 25 kilometre radius of the Palais des Nations. The Applicant, who is not a Swiss national, was employed as a Finance Clerk at UNOG and resided more than 25 kilometres from the Palais des Nations when he was recruited. He was appointed on 4 August 1980 as a non-local recruit. The Applicant contends that, given the foregoing facts concerning his nationality and residence, he was properly appointed with non-local status pursuant to Appendix B to the Staff Rules. In contrast, the Respondent contends that it would be unreasonable, simply because the Staff Rules provide that a locally recruited official is one who resides within 25 kilometres of the Palais des Nations, to interpret the Rules as requiring that

the Respondent pay international benefits to a staff member not so residing. Further, the Respondent argues that the provisions of the Staff Regulations governing General Service staff focus on the type of skills needed for a post rather than on the address of the successful applicant at the time of his recruitment; he refers to Annex 1, paragraph 6 of the Staff Regulations, which provides that the salary scales of staff in the General Service and related categories are fixed by reference to best prevailing local rates. The Respondent explains that the Applicant was initially given non-local status due to a simple administrative error in an internal document known as a "check-list". The Respondent cites a Referral Sheet, dated 14 November 1983, from the Chief, Personnel Service, that points out that Finance Clerks are not among the category of staff who may be recruited on non-local basis.

III. The Respondent states that UNOG's practice when filling General Service positions, such as the Applicant's, is not to bar candidates simply because they reside more than 25 kilometres from the Palais des Nations. If the selected candidate accepts such a position and commutes more than 25 kilometres from his residence, the candidate will still be recruited "locally" since he is encumbering a local post. The Respondent also points out that the employment contract of any General Service candidate not recruited locally will explicitly describe the new employee's recruitment status, since non-local status is an exception to the General Service category's normal recruitment procedures. The employment contract is signed by the Applicant and his signature is evidence of his acceptance of the terms of his employment. The Respondent refers to the JAB's finding that the absence of any reference to the Applicant's local/non-local status in the offer of employment made to the Applicant should be interpreted to include him in the broad category of General Service staff, who are normally recruited on a local basis in accordance with Appendix B of the Staff Rules.

IV. The Applicant contends that this argument shows a confusion on the Respondent's part between the status of a staff member and the attributes of the post. In support of his case, the Applicant refers to UNAT Judgement No. 508, Rosetti (1991), which, in referring to conditions for international recruitment of a General Service category staff member, says that the relevant condition is that they have been "recruited from outside the area of the duty station". The Applicant also refers to the statement in the judgement that "the Tribunal considers that whether a staff member is entitled to the allowances or benefits in question is determined by the staff member's place of recruitment and not by the post occupied by him or her".

V. The Tribunal sympathizes with the Applicant's position and understands why he pursues this appeal. The words of Appendix B of the Staff Rules are perfectly clear and, taken on their own, support the Applicant's argument that, because he was a non-Swiss national residing, at the time of his appointment, more than 25 kilometres from the Palais des Nations, he is entitled to non-local status.

The Tribunal believes, however, that the Staff Regulations and the recruitment practices referred to above must also be taken into consideration. In addition, it is clear that the Applicant's current situation results from the error made in the relevant employment documentation at the time of his recruitment, and that the Organization never intended that he be recruited internationally.

The Tribunal has examined the Respondent's submissions concerning the policy governing General Service recruitment and believes such policy to be that the skills needed for a post, rather than the address at the time of the Applicant selected for that post, is the determining factor in the assessment of the employee's status. There is no reason to doubt the Respondent's statement that

the skills of the post at issue here did not necessitate international recruitment.

VI. The Tribunal has considered the Applicant's argument concerning Rosetti. However, in Rosetti, the Applicant had been properly recruited to a position reserved for international recruitment, since that position required special skills, and was later transferred to a post that was not so reserved. On these facts, the Tribunal indicated that Ms. Rosetti could not be deprived of her properly acquired status as an international recruit. In the present case, it is clear that the Applicant's non-local status was not properly acquired but rather acquired in error.

Judgement No. 612, Burnett (1993), differs from the present case. In Burnett, staff were recruited internationally for the same position for which the Applicant Burnett had been recruited locally, whereas in the present case, there is no evidence that staff were recruited internationally for positions such as the Applicant's. The Tribunal concludes that the Applicant has not established that he was properly given international status.

VII. However, the Tribunal notes that due to an error on the part of the Administration, the Applicant has been treated as an international recruit since 1980. The Administration discovered its error as early as 1983, and yet it allowed the situation to continue. Indeed, no further action was taken until 1994. In response to a question posed by the Tribunal concerning the Respondent's delay in remedying the error, the Respondent could not provide an explanation. The Tribunal believes that it would be unjust and inequitable if the benefits accruing to the Applicant as a result of this error, which continued uncorrected by the Administration, were now to be terminated. Had the mistake been corrected when it was discovered in 1983, the situation would have been different. However, the Administration allowed an egregious

amount of time to elapse before attempting to correct the error and is unable to offer any explanation for its delay. Given the foregoing, the Tribunal finds that the Applicant reasonably relied on the Administration's inaction as a tacit acknowledgment that the Applicant had properly been given international status. Therefore, to terminate the Applicant's benefits at this point would result in a severe and unacceptable penalty for the Applicant, since the benefits at issue arise from an error that was negligently not addressed by the Administration and, further, was not of the Applicant's making.

VIII. The Tribunal, therefore, orders that the Applicant should continue to be treated as having international status with respect to the benefits accruing therefrom. The Tribunal further orders that the Applicant's benefits should be reinstated with effect from the date on which they were suspended.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary